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Nos. 90-926 and 90-966

Supreme Court, U.S.

FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ALLIED DELIVERY SYSTEM, INC., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld a ruling of the Interstate Commerce Commission that certain motor carrier transportation between two points in Michigan through Indiana is subject to federal, rather than state, regulation.



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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a)¹ is not reported. The decision of the Interstate Commerce Commission (Pet. App. 18a-31a) is not yet reported.

¹ The petitions in Nos. 90-926 and 90-966 seek review of the same judgment on similar grounds. Our citations to "Pet. App." refer to the appendix to the petition in No. 90-926.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1990. A petition for rehearing was denied on September 10, 1990 (Pet. App. 17a-18a). The petition for a writ of certiorari was filed on December 10, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Interstate Commerce Act, the ICC exercises regulatory jurisdiction over transportation by motor carriers in *interstate* commerce. 49 U.S.C. 10521(a)(1). The statute reserves to the States authority to regulate wholly *intrastate* motor transportation. 49 U.S.C. 10521(b)(1).

The interstate transportation within the ICC's jurisdiction includes transportation "between a place in * * * a State and another place in the same State through another State." 49 U.S.C. 10521(a)(1)(B). The courts and the ICC have recognized an implied exception to that element of the ICC's jurisdiction, however, for cases in which a carrier crosses state lines merely as a subterfuge to evade legitimate state regulation of intrastate commerce. See *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171, 179 (1959); *Eichholz v. Public Serv. Comm'n*, 306 U.S. 268, 274 (1939); *Pennsylvania PUC v. Arrow Carrier Corp.*, 113 M.C.C. 213 (1971) [hereinafter *Arrow*], *aff'd sub nom. Pennsylvania PUC v. United States*, 1973 Fed. Carr. Cas. (CCH) ¶ 82,419 (M.D. Pa. 1973), *aff'd per curiam*, 415 U.S. 902 (1974).²

² Accord *Service Trucking Co.*, 94 M.C.C. 222, 225 (1963), *aff'd sub nom. Service Trucking Co. v. United States*, 239 F. Supp. 519, 521 (D.Md. 1965) (three-judge court), *aff'd per curiam*, 382 U.S. 43 (1965); *Pennsylvania PUC v. Hudson*

2. Respondent Hover Trucking Company of Michigan (Hover) is a motor carrier holding nationwide authority from the ICC to transport general commodities in interstate commerce. Pet. App. 20a. In March 1988, petitioner Michigan Public Service Commission (MPSC) filed a complaint with the ICC, under 49 U.S.C. 11701, alleging that Hover was routing shipments between points in Michigan through its South Bend, Indiana, break-bulk and consolidation facility in order to evade Michigan's regulation of motor carrier transportation within that State. Several other parties, including petitioners Allied Delivery System, Inc., Alvan Motor Freight, Inc., and Parker Motor Freight, Inc., intervened in support of the complaint. Pet. App. 18a.

The ICC heard the MPSC's complaint in accordance with its "modified procedures," 49 C.F.R. Pt. 1112, under which evidence is submitted in written form. Based upon the resulting record, the ICC concluded that the MPSC had "failed to establish that [Hover] routes traffic moving between points in Michigan through South Bend as a subterfuge to transform intrastate traffic into interstate traffic so as to avoid Michigan's regulatory jurisdiction." Pet. App. 31a.

a. At the outset, the ICC reviewed the history and basic pattern of Hover's operation. Prior to 1979, Hover operated primarily as a local interline carrier

Transp. Co., 88 M.C.C. 745, 748 (1962), *aff'd sub nom. Hudson Transp. Co. v. United States*, 219 F. Supp. 43 (D.N.J. 1963) (three-judge court), *aff'd per curiam sub nom. Arrow Carrier Corp. v. United States*, 375 U.S. 452 (1964); *Rock Island Motor Transit Co. v. Watson-Wilson Transp.*, 99 M.C.C. 303 (1965), *aff'd sub nom. Rock Island Motor Transit Co. v. United States*, 256 F. Supp. 812 (S.D. Iowa 1966) (three-judge court).

(a connecting line for longer haul carriers) in southwestern Michigan and northern Indiana; it conducted this business from a single terminal in Niles, Michigan. Pet. App. 20a. In 1979, under new ownership, Hover began to interline freight at South Bend, Indiana as well. *Ibid.* Hover also began to expand its own single-line operations (operations in which Hover would itself transport freight from the freight's origin to its destination). By late 1982, Hover had outgrown its Niles terminal, which had only 20 doors and 3,000 square feet of platform space. Consequently, in June 1983, it acquired a larger terminal in South Bend—with 37 doors and over 12,000 square feet of dock space—from another carrier. In June 1985, Hover moved into even larger quarters at South Bend—with 48 doors and over 20,000 of platform space—from which it currently operates. *Ibid.*

During its period of expansion, Hover established a network of agency terminals, from which agents provide local pickup and delivery services within their respective territories. Hover has three such terminals in Wisconsin, one in Kentucky, six in Illinois, four in Indiana, three in Ohio, and seven in Michigan. Pet. App. 21a. Even though its service area has expanded, Hover has continued its basic pattern of service. A shipment picked up by one of Hover's agents is first brought to that agent's terminal, where it is loaded onto a trailer moving to Hover's large break-bulk and consolidation facility at South Bend. At South Bend, shipments arriving from the agency terminals are sorted and loaded onto trailers which take them to the appropriate agency terminals for delivery to their destinations. *Ibid.*

b. Petitioners' basic contention is that the application of this system to freight moving between points

in Michigan is a subterfuge designed to avoid Michigan motor carriage regulation. Pet. App. 21a. In analyzing that claim, the ICC applied the three-part test outlined in its *Arrow* decision (Pet. App. 26a):

In determining whether bad faith or subterfuge is involved, the Commission and courts generally look to the reasonableness of the carrier's manner of operations, as evidenced by: (1) the degree of circuitry involved in the interstate route when compared with routes of intrastate carriers; (2) the presence or absence of economic or operational [justification] for such routing apart from a carrier's potential lack of intrastate authority or, if relevant, desire to transport otherwise unavailable traffic; and (3) the relationship of the traffic which would otherwise be intrastate traffic to the carrier's overall operations. No single factor is controlling, nor is there any presumption in favor [of] or against any one.

The ICC applied each of those criteria to the particulars of Hover's operation.

i. The ICC noted that circuitry "does not play a major role in evaluating whether a LTL carrier's operation * * * is reasonable and logical," since "a circuitous operation through a consolidated terminal can be more logical and efficient than a more direct operation" and "as a matter of economic and practical necessity, LTL traffic generally must be handled through terminals for consolidation and break-bulk, notwithstanding that this often results in circuitous routing." Pet. App. 26a-27a; see *id.* at 27a n.2 (noting the increasing use of "hub" operations in truck-

ing, air freight, and air passenger service).³ The ICC found that the appropriate circuitry factor for Hover's operation was 24.2%, a figure well below those the ICC had found acceptable in prior cases. *Id.* at 27a. In determining the circuitry of Hover's operation, the ICC included all traffic moving to or from Hover's Michigan terminals (including traffic with origins or destinations outside Michigan). The Commission rejected petitioners' position that the calculation should reflect only Michigan-to-Michigan traffic, explaining that "[b]ecause all traffic moves in the same vehicles to and from South Bend, it is inappropriate to exclude arbitrarily the traffic moving ultimately to or from points outside Michigan." *Id.* at 27a n.3.⁴ The ICC concluded that "the circuitry of operation experienced by Hover in moving shipments to and from its South Bend break-bulk facility is an ordinary and routine facet of the business of transporting less-than-truckload shipments of general commodities through such a facility." *Id.* at 27a.

ii. With respect to the operational justification for Hover's use of its South Bend terminal, the ICC noted that it had "recognized repeatedly that operat-

³ The abbreviation "LTL" refers to freight shipped in lots smaller than a single truckload. Pet. App. 19a. Carriers handling such freight must attempt to combine and route shipments in a manner minimizing their overall costs.

⁴ Under the ICC's analysis, all freight originating in or destined for Michigan terminals travelled 24.2% farther than it would have if it had been shipped directly, without passing through South Bend. A study conducted by MPSC in March 1988 showed that the subcategory of freight originating in and destined for terminals in Michigan had a circuitry factor of 92%. In other words, as a result of being routed through South Bend, that freight travelled 92% farther than it would have if shipped directly. Pet. App. 21a-22a & n.1.

ing through a consolidation terminal is a reasonable manner of transporting LTL, general-commodity traffic, even when it involves moving single-State traffic through a terminal in another State." Pet. App. 28a. The Commission found that "the South Bend location for [Hover's] facility is a logical choice considering the fact that Hover's operations encompass the six-State area of Wisconsin, Kentucky, Illinois, Indiana, Ohio, and Michigan" and that "South Bend is centrally located in this area." *Ibid.* The Commission thus rejected petitioners' contention that Hover's sole purpose in moving its headquarters to South Bend was to avoid Michigan regulation. The ICC found that a statement by Hover's principal to a reporter that the move would enable Hover to serve Michigan without obtaining MPSC authority for intrastate transportation "does not form any basis for us to conclude that the operation is not authorized or even that the purpose of the move to South Bend was to avoid MPSC regulation." *Id.* at 29a. The ICC added that "[i]n any event, motivation is not relevant * * * because the criteria set forth in *Arrow, supra*, have been met." *Ibid.*

Hover's operation, the ICC continued, was "a logical solution for a carrier that has relatively light volumes of freight moving between most of its individual terminals." Pet. App. 29a. Referring to evidence concerning the small volumes of freight moving between any two terminals in Michigan, the ICC found that "[d]irect over-the-road movements between individual terminals generally would not be economically feasible." *Ibid.* By contrast, the ICC continued, the system in place "gives Hover the advantage of scale economies generated *both* by the aggregation of traffic moving between Michigan terminals and with the much larger volume of traffic mov-

ing between these terminals and points outside of Michigan" and "allows Hover to provide overnight service on much traffic that would not otherwise receive it." *Ibid.* The ICC concluded that "Hover's use of its South Bend facility is a reasonable, logical, and normal way of handling LTL traffic." *Ibid.*⁵

iii. Finally, with respect to the relative significance of the single-state traffic involved in Hover's operation, the ICC found that single-state shipments constituted 9.94% of Hover's system-wide shipments. This figure, the ICC noted, was well below the comparable figure in another case in which it had sustained a carrier's position that freight was not being routed to evade state regulation. Pet. App. 30a.

3. By a 2-1 vote, the court of appeals upheld the Commission's decision in an unpublished opinion.

⁵ Hover presented evidence that its system is typical of LTL freight carriers, whose operational effectiveness depends more on keeping overall costs low than on limiting the number of miles any particular shipment travels. Pet. App. 24a. According to that evidence, use of a central terminal facility as a hub for agency terminals allows Hover to maintain control over all of its shipments at that facility; to base all of its vehicles there; to centralize paperwork, dispatch, and other shipment responsibilities in its headquarters; to dispatch freight to each of its agency stations each night (rather than having to hold it in cases where there was insufficient freight moving between particular stations); and to avoid low freight density between individual terminals. *Id.* at 23a-24a. According to Hover's evidence, the average amount of freight moving between any two of its Michigan terminals each night ranged between 1,000 and 7,500 pounds; the average two-way flow between South Bend and each Michigan terminal ranged between 30,000 and 80,000 pounds. *Id.* at 24a. The net result of the use of the South Bend facility, according to Hover's evidence, is a reduction both in the total vehicle miles travelled and the number of vehicles operated. *Ibid.*

Pet. App. 1a-16a. The majority observed at the outset that the ICC "was well within its jurisdiction" in regulating transportation between two points in a State through another State; the majority explained that the ICC's jurisdiction is not limited to situations in which that regulation would not interfere with a State's regulation of intrastate commerce. *Id.* at 5a.

With respect to petitioners' contention that Hover had employed its South Bend terminal in bad faith to evade state regulation of Michigan-to-Michigan freight, the majority held that there was substantial evidence supporting the ICC's conclusion that Hover's operation passes muster under the three-part *Arrow* analysis. Pet. App. 7a. Rejecting petitioners' contention that the Commission had misapplied the circuitry factor of that analysis, the majority explained that "it is logical that the importance of the circuitry factor should vary in inverse proportion to the strength of the economic or operational justification of the routing"; that "[s]poke-and-hub traffic patterns often improve efficiency by decreasing unused capacity"; and that "the ICC has long recognized that the use of such patterns may promote the efficient movement of less-than-truckload-lot shipments of freight." *Ibid.* The majority reviewed the pattern of freight moving within Hover's system and found "no basis for rejecting the Commission's conclusion that the spoke-and-hub system was more efficient overall." *Id.* at 8a.

Finally, the majority rejected petitioners' contention that the ICC had overlooked direct evidence of bad faith. Although "given pause" by the ICC's observation that motivation was irrelevant in light of Hover's showing under the *Arrow* criteria (Pet. App. 8a), the majority determined that the ICC had in fact considered the relevant evidence. The court concluded

that "it was within the Commission's province to find" that this evidence of motivation was not dispositive (*id.* at 9a). The majority was thus unwilling to disturb the ICC's decision to "giv[e] the apparent efficiency of Hover's operations more weight than the direct evidence of bad faith." *Ibid.*

Judge Wellford concurred in part and dissented in part. He would have remanded to the Commission for further consideration of the issue of circuitry and petitioners' evidence regarding motivation. Pet. App. 9a-16a.

ARGUMENT

1. The basic principles applicable to this case are well established. The ICC exercises exclusive jurisdiction over motor carriage in interstate commerce, including transportation between points in a single State through a second State. 49 U.S.C. 10521 (a)(1)(B).⁶ Within the scope of its jurisdiction, the Commission's authority is plenary. The statute establishes "a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce. * * * No power at all was left in the states to determine what carriers could or could not operate in interstate commerce." *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61, 63 (1954). Cf. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981) (Interstate Commerce Act designed to achieve uniformity of regulation). When a carrier is operating under an ICC certificate of convenience and necessity, the Commission has primary jurisdiction to

⁶ See, e.g., *Jones Motor Co. v. United States*, 223 F. Supp. 835, 836 (E.D. Pa. 1963) (three-judge court), *aff'd per curiam sub nom. Highway Express Lines, Inc. v. Jones Motor Co.*, 377 U.S. 217 (1964); *Tri-D Truck Lines, Inc. v. ICC*, 303 F. Supp. 631, 634 (D. Kan. 1969) (three-judge court).

determine whether particular transportation is interstate in character and thus authorized by the certificate. *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959). A State that believes that a carrier's operation "is not bona fide interstate but is merely a subterfuge to escape its jurisdiction" is required to commence a complaint proceeding before the ICC to enable the Commission to determine whether the carrier has abused its certificate. *Id.* at 179.

Thus, contrary to petitioners' contention (90-926 Pet. 11-18; 90-966 Pet. 8-9), this case presents no substantial issue regarding the division of state and federal authority in this area. The statute and this Court's decisions make clear the extent to which the ICC exercises exclusive jurisdiction and the procedures for resolving disputes as to the applicability of state and federal regulatory schemes to motor carriage. In particular, there is no conflict between the court of appeals' decision and *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). In that case, the FCC sought to regulate the depreciation of equipment that was concededly used in *intrastate* telephone communication. In construing the Federal Communications Act to reserve that area to the State, the Court did not suggest any limit on the Commission's authority over *interstate* communication, the analogue of the ICC authority at issue here. See *Texas v. United States*, 866 F.2d 1546, 1553 (5th Cir. 1989). As the court of appeals noted, this case presents only the question whether the Commission's application of an established construction of the ICC's governing statute to the particular facts of this case should be upheld under applicable standards of judicial review.

2. As noted, the Commission and the courts have recognized a narrow exception to the Commission's

authority over interstate motor carriage for cases in which a shipment "[is] not in good faith but was a mere subterfuge to evade the state's requirement as to intrastate commerce." *Eichholz v. Public Service Comm'n*, 306 U.S. 268, 274 (1939). The burden of establishing the applicability of that exception is on the party challenging the Commission's jurisdiction. *Rock Island Motor Transit Co. v. Watson-Wilson Transp.*, *supra*; *Missouri Public Serv. Comm'n v. Missouri Arkansas Transp. Co.*, 103 M.C.C. 641 (1967). In assessing such claims, the Commission routinely employs the three-factor *Arrow* analysis that it applied in this case.

The Commission's determination that Hover's operation was not a mere subterfuge to avoid Michigan's regulation of intrastate commerce was fully justified by the administrative record. Contrary to petitioners' suggestion (90-926 Pet. 3-4; 90-966 Pet. 3-4), there was substantial evidence that Hover had relocated its headquarters for reasons other than avoiding Michigan regulation. The ICC found that "the South Bend location for [Hover's] facility is a logical choice considering the fact that Hover's operations encompass the six-State area of Wisconsin, Kentucky, Illinois, Indiana, Ohio, and Michigan" and that "South Bend is centrally located in this area." Pet. App. 28a. Petitioners' attempt to link the relocation to Hover's acquisition of ICC authority to operate interstate is unpersuasive. As the Commission noted, the company's relocation from Michigan to much larger quarters in South Bend took place against the background of its evolution from a small, primarily interline carrier operating in parts of Michigan and Indiana into a far larger single-line carrier operating in six States. See *id.* at 18a.

Likewise, the record supports the Commission's conclusion that Hover's method of operations—under which LTL shipments are sent from agency terminals to South Bend and routed back to those terminals—is “a reasonable, logical, and normal way of handling LTL traffic.” Pet. App. 29a. A central or regional consolidation and break-bulk facility is a routine feature of LTL operations the ICC has upheld against similar challenges. See *Missouri Pub. Serv. Comm'n v. Missouri-Arkansas Transp. Co.*, 103 M.C.C. at 641. See also *Service Storage & Transfer Co. v. Virginia*, 359 U.S. at 176.⁷ In this case, the Commission found that Hover “lacks sufficient freight volume between its Michigan terminals to establish a system of regular direct runs between those terminals” and that the carrier's hub-and-spokes system yields significant economies of scale. Pet. App. 29a. Of course, the fact that such a system sometimes results in quite circuitous routings—a fact on which the intervenor-petitioners place great emphasis (90-966 Pet. 5-6, 18-19)—does not undermine the system's overall economic justification.

Although petitioners do not question the general validity of such a system, they find fault with two aspects of the ICC's analysis of the record in this case. Petitioners argue that the Commission improperly refused to consider so-called “direct evidence of bad faith” and misapplied the circuitry factor of the *Arrow* analysis. 90-926 Pet. 5-11; 90-966 Pet. 12-24. Neither contention presents an issue warranting this Court's attention.

⁷ Indeed, other sectors of the transportation industry, most notably air carriers (moving freight as well as passengers), have increasingly adopted “hub” operations to increase traffic density and lower overall costs.

a. The ICC did not ignore evidence proffered by petitioners. After describing a statement by Hover's principal to a reporter to the effect that the move to South Bend would enable Hover to serve Michigan without authority from that State, the ICC found that this statement "does not form any basis for us to conclude that the operation is not authorized or even that the purpose of the move was to avoid [Michigan] regulation." Pet. App. 29a. Given the regulatory background, it is a fact that a move to South Bend for bona fide business reasons would have the effect of allowing Hover to serve Michigan by means of its established pattern of operations without intrastate authority. It does not follow, as petitioners suggest, that the move must necessarily have been motivated by a desire to evade state regulation. As the court of appeals explained, "[w]here the move is adequately justified on economic grounds, we cannot say that the ICC was required to find bad faith because Hover recognized the regulatory consequences as well." *Id.* at 9a.⁵

Petitioners place great emphasis on the Commission's additional observation that the evidence of motivation was not relevant "[i]n any event" (Pet.

⁵ The intervenor petitioners also highlight evidence that Hover made some unlawful direct shipments between Michigan terminals. However, Hover submitted evidence that it has established procedures to ensure that such shipments are not repeated (Pet. App. 25a), and the issue in this case is whether those shipments that did go to South Bend were routed there as part of a subterfuge to avoid state regulation. The significance due this evidence was an issue for the Commission; its assessment presents no question calling for this Court's review. See *Rock Island Motor Transit Co. v. Watson-Wilson Transp.*, 99 M.C.C. at 312 (even past unsuccessful attempts to obtain intrastate authority did not warrant a finding of subterfuge for interstate routing).

App. 29a) in view of the showings that had been made in this case on the three *Arrow* factors. In context, however, that observation was at most an alternative ground for the Commission's refusal to base a finding of bad faith on petitioners' limited evidence of motivation. The Commission has not indicated that it will refuse to consider such evidence in a case in which there is room for doubt as to the bona fides of a carrier's operations. This Court's review is not warranted to address a statement in the Commission's opinion which—the opinion makes clear—had no effect on the result.

Michigan argues that, in *Service Storage & Transfer Co. v. Virginia*, *supra*, this Court has held that direct evidence of bad faith is controlling and that the three *Arrow* factors may be considered only in the absence of such evidence. 90-926 Pet. 7 & n.2. The Court's opinion says no such thing. See 359 U.S. at 175, 177. Indeed, since the only question decided in *Service Storage* was whether a claim of bad-faith routing should be presented to the Commission in the first instance, this Court had no occasion to consider the standards governing such claims. Moreover, a rule barring resort to the *Arrow* factors in cases of this type would be unjustifiable. Showings of the sort made by Hover in this case—that a carrier's operation is economically justified, that routings are not unduly circuitous, and that the carrier's single-State business accounts for a small percentage of its overall business—go directly to a claim that the carrier has structured its operations to evade state regulation.

b. Circuity of routing does not establish subterfuge where there is a legitimate purpose for such routing. *Gray Line Tour Co. v. ICC*, 824 F.2d 811, 815 (9th Cir. 1987) (involving tour bus operation).

Indeed, where LTL traffic is concerned, a circuitous operation through a consolidation terminal can be more efficient than a direct operation. *Rock Island Motor Transit Co. v. Watson-Wilson Transp.*, 99 M.C.C. at 306. Thus, the proper measure of the circuitry of a carrier's routings and the significance of this factor are matters within the expertise of the ICC.

The ICC's analysis of the circuitry of Hover's routings was fully justified. Under Hover's system, trucks moving from each agency terminal in Michigan to South Bend carry shipments destined for other points in Michigan and for points in other States, and trucks moving from South Bend to a Michigan agency terminal carry shipments from other points in Michigan and from other States. In evaluating the justification for Hover's overall system, it was therefore reasonable for the Commission to aggregate all such shipments in determining the circuitry of Hover's operation.⁹ There is no merit to petitioners' contention (90-926 Pet. 8-11; 90-966 Pet. 20-22) that *Service Storage & Transfer Co. v. Virginia*, *supra*, and *Eichholz v. Public Service Comm'n*, *supra*, require the Commission to adhere to any particular analysis of the issue of circuitry. Neither case addressed that question.

3. Although Michigan's petition does not present the question whether the Commission's procedures were deficient (90-926 Pet. i), Michigan argues that it should have received a "formal hearing" (*id.* at

⁹ See *Rock Island Motor Transit Co. v. Watson-Wilson Transp.*, 99 M.C.C. at 311 (where routings for single-state shipments through another state are similar to those used for multi-state shipments, they are not contrived or especially designed to attract normally intrastate traffic).

19-21). In this case, the Commission was operating under authority of a statutory provision, 49 U.S.C. 11701, that does not require the Commission to reach a decision on the record after an agency hearing. Thus, the APA requirements triggered by such a requirement were inapplicable. 5 U.S.C. 554(a).

The Commission heard this case in accordance with "modified procedures"—under which evidence is submitted in written form—that the ICC regularly employs in cases in which "it appears that substantially all material issues of fact can be resolved through submission of written statements, and efficient disposition of the proceeding can be accomplished without oral testimony." 49 C.F.R. 1112.1. These procedures assure parties a fair hearing, and their sufficiency has been upheld in other proceedings conducted under provisions that do not trigger the APA. *Trailways, Inc. v. ICC*, 631 F.2d 252, 253-254 (5th Cir. 1982); *Crete Carrier Corp. v. United States*, 577 F.2d 49, 50 (8th Cir. 1978). Cf. *United States v. Florida East Coast R.R.*, 410 U.S. 224 (1973).

Michigan's petition does not identify any specific respect in which the State was prejudiced by the absence of an oral hearing. It also failed to state with specificity why such a hearing was necessary in its reply statement filed with the ICC, as required by the relevant Commission rule. 49 C.F.R. 1112.10.¹⁰ Fi-

¹⁰ That regulation states:

Requests for oral hearings in matters originally assigned for handling under modified procedure should be included in the reply or rebuttal statement. The reasons why the matter cannot be properly resolved under modified procedure must be set out in full. Requests for cross examination of witnesses must include the name of the

nally, the record forecloses any claim that the absence of an oral hearing denied Michigan an opportunity to establish its claim. In its written submissions, Michigan was able to confront the facts on which Hover relied to establish the legitimacy of its operation. Hover's principal was subjected to cross-examination in a prior state proceeding, and the record of that proceeding was before the Commission here. 90-966 Pet. 19. Indeed, the intervenor-petitioners emphasize—referring to various sources of information before the ICC in this case—that “[t]his record is complete.” *Ibid.*

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1991

witness and the subject matter of the desired cross examination.

